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Nos. 92-362 and 92-375

IN THE

# Supreme Court of the United States

**October Term, 1992**

Arizona State Senate, Hispanic Chamber of Commerce, et al.,
*Appellants,*

v.

Arizonans for Fair Representation, et al.,
*Appellees.*

**Appeal From The United States District Court For The District Of Arizona**

## MOTION TO AFFIRM

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Assuming, *arguendo*, that appellants showed that a second minority district could be formed in the additional district apportioned to the State of Arizona following the decennial census, does a congressional redistricting plan violate the retrogression standard of section 5 of the Voting Rights Act of 1965, as amended, where the absolute number of minority districts remains the same but the percentage of minority districts are proportionately less than before the reapportionment?

2. In a proceeding to adopt congressional districts because of a legislative deadlock, was it reversible error for the district court to find that none of the parties had proven a violation of the Voting Rights Act of 1965, as amended, in determining which plan to adopt?

3. In a proceeding where a district court adopts a congressional redistricting plan in the face of a legislative deadlock, was it necessary to make findings pursuant to Rule 52(a), Federal Rules of Civil Procedure, as to the evidence concerning each element of a violation of the Voting Rights Act, or was it sufficient for the court to make findings as to which plan best satisfied the requirements of the U.S. Constitution, the Voting Rights Act, and neutral redistricting criteria?

## RULE 29.1 Statement

Appellee Arizonans for Fair Representation, Inc. is an Arizona non-profit corporation and has no parent or subsidiary.

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*v.*

ARIZONANS FOR FAIR REPRESENTATION, ET AL.,
*Appellees.*

**Appeal From The United States District Court For The District Of Arizona**

## MOTION TO AFFIRM

Appellees, the Arizona State House of Representatives, Governor J. Fife Symington, Arizonans for Fair Representation, Inc., Paul Fannin, John Mawhinney, and Stan Turley, for the reasons detailed herein, move to affirm the judgment of the district court on the grounds that the instant appeals of the Arizona State Senate (the "Senate") and the Hispanic Chamber of Commerce (the "Hispanic Chamber")[1] raise no substantial questions that warrant further argument and that the judgment of the court below was correct.

Reduced to their essence, these appeals attack the unanimous decision of the three-judge district court to adopt a congressional redistricting plan that enhances Hispanics' opportunity to elect the representative of their choice in one district but which declined to create what the district court

[1] For convenience, this motion will refer to all of the Hispanic appellants (the Hispanic Chamber of Commerce, the Hispanic Community Forum, Edward Valenzuela, Richard Zazueta, and Valerie Ann Vidal) as the "Hispanic Chamber."

termed "an unreasonable gerrymander" (with a 21% Democratic Party registration edge) in a second district. Although appellants characterized it as a second "majority minority district," it only had a Hispanic voting age population of 19% and a *combined* minority voting age population of at best 43.6%, *and*

- appellants never showed that the various minority groups were politically cohesive such that they could be aggregated,
- such a district required a classic gerrymander that joined geographically distant communities and, in the court's words, required "block-by-block redistricting over a large geographic portion of Maricopa County" so as to pull various precincts into the district, the effect of which was "the fragmentation and splintering of communities of interest," and
- the evidence at trial showed that the district, as proposed by the Senate (and largely copied by the Hispanic Chamber), was designed by an Anglo State Senator who was interested in running in the "minority" district he created.

Appellants claim the court's plan constitutes retrogression under the Voting Rights Act because it allegedly does not "fairly reflect the voting strength" of the *combined* minority population of the State. However, Section 2 of the Voting Rights Act expressly disavows the right to proportional representation, and in any event, the court's plan created one Hispanic district out of Arizona's six congressional seats (16.7% of the seats), giving Hispanics, who constitute 15.7% of Arizona's voting age population, their proportionate share of the seats.

Despite several other claims of error concerning the Voting Rights Act, nowhere do appellants contend — nor do they make any showing — that as a consequence, the court-adopted plan violates the Voting Rights Act. Accordingly, the judgment of the court below should be summarily affirmed.

## COUNTER-STATEMENT OF THE CASE

### A. The Proceeding Below

Following the 1990 decennial census, Arizona became entitled to six congressional districts, up from five districts during the 1980's. (See Pretrial Order, p. 4). The 1990 census disclosed that 18.8% of Arizona's population was Hispanic, 5.5% was Native American, and 3% was African American. (*Id.* at p. 5).

Efforts at congressional redistricting, however, were stymied when the Democratic-controlled Senate and the Republican-controlled House deadlocked. On February 7, 1992, with the commencement date for filing candidate nominating petitions less than four months away, *see* A.R.S. §§ 16-311, 16-314, plaintiffs — Arizonans for Fair Representation and various individuals — brought this action in the United States District Court for the District of Arizona requesting the court to implement a congressional (and state legislative redistricting plan)[2] in time for the 1992 elections.

By order filed March 3, 1992, the district court scheduled the trial to commence on April 13, 1992, and set deadlines for the parties to file their proposed redistricting plans, for others to intervene in the action, and for the exchange of discovery and witness statements.

### B. The District Court's Opinion

On May 5, 1992, following a 4½-day trial, the district court filed a memorandum of decision and order. In a 3-0 decision, it adopted a congressional redistricting plan based on a plan submitted by the appellee Native American intervenors (known as

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[2] At the time, the State Legislature had not passed a state legislative redistricting plan, but subsequently one was enacted and proceedings as to the state legislative districts were stayed pending preclearance by the Department of Justice. A subsequent objection by the Department of Justice resulted in the district court ordering interim state legislative districts for the 1992 elections. A separate appeal has been taken from that order by the Hispanic Chamber of Commerce. However, the instant appeals do not address the state legislative districts.

the "Indian Compromise Plan"),[3] which the court further modified.

In considering each of the plans proposed — and contrary to appellants' arguments — the court recognized a "strict hierarchy" among the criteria used to evaluate redistricting plans: It ruled that the U.S. Constitution and the Voting Rights Act must be satisfied before a court considers neutral redistricting criteria. (Opinion at 4A).[4]

Since each of the plans had a maximum population deviation between districts of only one person — thereby satisfying the constitutional standard for equality of population among districts as required by Article I, Section 2 of the U.S. Constitution — the primary issues litigated before the court were (i) each plan's compliance with the Voting Rights Act, and (ii) in the event of compliance, its satisfaction with neutral principles of redistricting. The Voting Rights Act issues primarily concerned districts 2 and 6, the two districts with the potential for having the largest minority populations.

With respect to district 2, the key issue was whether the proportion of the Hispanic voting age population in that district should be over 50%, as proposed by the appellee House or around 45% as proposed by appellants (the Senate and Hispanic Chamber) and the appellee Indian intervenors. (*See* Senate Exh. 109 and Opinion at 13A). The district court found that "there has been unpersuasive evidence showing that the white majority in district two votes sufficiently as a bloc usually to defeat a Hispanic voter's candidate of choice" and therefore concluded that a 44.7% Hispanic voting age population and a

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[3] The court permitted several Native American Tribes and individual Native Americans to intervene. For convenience, they will be referred to herein as the "Indian intervenors."

[4] All references to the court's opinion will cite to the reproduction of the opinion in appendix A of the Senate's Jurisdictional Statement. For convenience, references in this brief will refer to "Opinion at ___." However, please note that the Hispanic Chamber's reproduction of the court's opinion also includes the court's appendix showing the statistical breakdown of each district by population and minority group.

50.46% overall Hispanic population was sufficient to provide them access to the political process. (Opinion at 10A). This accorded with the appellants' position, who do not challenge the court's determination of this issue on appeal.[5]

With respect to Arizona's new district, district 6, the appellant Senate proposed a district with an *aggregate* 43.5% minority voting age population.[6] Appellant Hispanic Chamber proposed a similarly configured district with an aggregate 43.6% minority voting age population. However, to achieve this aggregate, the Senate's district 6 had to begin in *northwestern* Arizona near Lake Mead, winding its way through the Navajo and Hopi Reservations in *northeastern* Arizona, and turning south to capture East Tucson in Pima County in the *south,* and finally ending in Maricopa County, where it "hopscotches block-by-block" through portions of Maricopa County, taking various precincts from Chandler, Mesa, southern Phoenix, and Glendale. (Opinion at 14A). A reproduction of the Senate's proposed district is set forth in Appendix A herein.

The district court concluded that "[t]he Senate plan is the ultimate fragmentation of counties, cities and neighborhoods, and consequently fails to promote the principles of good government" (Opinion at 15A), and further found:

> Applying the totality of the circumstances test under the Voting Rights Act, the court finds that adopting the Senate's reasoning [calling for a proportionate number of minority districts] would result in block-by-block redistricting over a large geographical portion of Maricopa County. The effect would be the fragmentation and splintering of communities of interest, resulting in

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[5] The court-adopted district 2 has a Hispanic voting age population of 44.77%. This was only .17% more than that proposed by the Senate (which had proposed a Hispanic voting age population of 44.6%) and only .53% less than that proposed by the Hispanic Chamber (which had proposed a Hispanic voting age population of 45.3%). (See Senate exh. 109).

[6] The Senate's 43.5% aggregate minority voting age population consisted of 4.3% for African Americans, 20.1% for Native Americans, and 19.1% for Hispanics. (See Senate exh. 109).

an unreasonable gerrymander. *See Gingles,* 478 U.S. at 49.

Opinion at 11A.

Indeed, testimony at trial demonstrated that the Senate's plan fragmented the Hispanic community around 16th Street in Phoenix between districts 2 and 6, cut off the Hispanic population in Guadalupe from the nearby Hispanic communities to the west, alternated between districts 1 and 6 on a block-by-block basis through Mesa and Gilbert, and split Queen Creek (TT 4/13/92 at pp. 120-122, 134, 149-151), ultimately creating a district with a 21% Democratic registration edge. (Senate exh. 109). The evidence at trial also showed that the Senate's district 6 was designed by an Anglo State Senator who admitted that he was interested in running in the purported "minority" district that he had formed. (TT 4/14/92 at 199-201, 203). Significantly, the overwhelming evidence at trial, including from appellants' experts, showed that the minority groups were not politically cohesive and could cancel each other out in favor of an Anglo candidate. (TT 4/12/92 at 77-81, 83-84, 86-87; 4/14/92 at 82-86; TT 4/16/92 at 117-119). Indeed, the results of a survey in district 6's area found that of those who expressed a view, not a single Indian would vote for a Hispanic but 46% would vote for an Anglo. (TT 4/13/92 at 83). Even appellants' experts' analyses showed a lack of cohesiveness among Indians and Hispanics in the Democratic primary elections (TT 4/16/92 at 118), although the groups tended to vote Democratic in the general election.

The Hispanic Chamber's plan closely resembled the Senate's plan, except it did not have as much of the "checkerboard appearance of the Senate's plan." (Opinion at 16A). Nonetheless, it moved in a long-ranging and contorted fashion, starting in *northwestern* Arizona, "envelop[ing] similar precincts in Maricopa County and split[ing] several communities," incorporating parts of East Tucson in the *south*, dipping into western Pima County "stopping just above the Mexican border" and virtually splitting the Hispanic's district 2 "in half." *Id.* A copy of the Hispanic Chamber's district 6 is attached as Appendix B hereto.



In contrast, the court's plan resulted in a district 6, which did *not* "spill over South Mountain into the Phoenix area for the purpose of including . . . precincts in South Phoenix." (Opinion at 17A). Flagstaff and Gilbert were not fragmented but placed in district 6. *Id.* It maintained the maximum number of Indian reservations possible within the district pursuant to the wishes of those Native American groups. Testimony at trial suggested that a politically competitive "swing" district, like the court's, would give Native Americans a greater influence in an election than if they were a minority in a predominantly Democratic-registered district. (TT 4/13/92 at 151-152; 4/14/92 at 86-88). Finally, unlike the Senate and the Hispanic Chamber's proposed plans, the court's plan did not include the Hopi Reservation in district 6 in accordance with the wishes of the Hopi's, a position that all parties ultimately conceded. (Opinion at 11A-12A).

### C. Appellees Disagree With The Senate's Characterization Of The District Court's Decision

Appellant Senate's Jurisdictional Statement mischaracterizes the decision of the court below in a number of respects. First, the Senate argues that as a result of the court's plan, "Arizona's remaining Hispanic population is scattered among the five other congressional districts so that it comprises no more than 16.51% of the total population of any single district . . . other than District 2." (Senate's Jur. State., p. 6, also p. 4). However, (i) this is only 5% less than what an "unreasonable gerrymander" could achieve, and (ii) there was no evidence that the court's plan, or the Indian Compromise Plan on which it was based, "scattered" the Hispanic population. To the contrary, the court's plan avoids fragmentation of geographically compact Hispanic communities in contrast to the Senate's plan, which the court found was "the ultimate fragmentation of counties, cities and neighborhoods." (Opinion at 15A). Indeed, the evidence at trial revealed that it was the Senate that fragmented the Hispanic community in Maricopa County among districts. (TT 4/13/92 at 120-122, 149-151; 4/14/92 at 64-65).

Second, appellant Senate argues that "[t]he primary disagreement among the litigants was over the degree of bloc voting

and over the consequent ability of a redistricting plan to provide two, rather than one, districts in which minorities would have an equal opportunity to elect representatives of their choice." (Senate's Jur. State., p. 5). In fact, while there was evidence of some racial polarization in Arizona, there was no evidence that racial bloc voting *defeated* the minority's preferred candidate. The Hispanic President of the Senate testified that he received 50% of the Anglo vote in his elections in his district (TT 4/15/92 evening session at 17), and another Hispanic Senator testified that the majority of Anglos voted for him against an Anglo. (TT 4/15/92 at 206-207). Indeed, over the past two decades, Arizona has elected a Hispanic Governor, a Hispanic congressman, and a number of Hispanic, African American, and Native American state legislators. The district court found — and appellants do not challenge here — that "none of the parties proved that a white majority voted sufficiently as a bloc so that it usually defeated a minority's preferred candidate." (Opinion at 8A).[7]

Instead, a primary disagreement at trial was whether the appellants' aggregation of African Americans, Hispanics, and Indians, totalling 43.5% of the voting age population in the appellants' proposed district 6, was justified on the basis of political cohesiveness among those groups. The overwhelming evidence, including from appellants' own experts on cross-examination, was that there was little cohesion among these groups. (TT 4/13/92 at 77-81, 83-84, 86-87; 4/14/92 at 82-84; 4/16/92 at 117-119).[8]

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[7] Dr. Brischetto, the Hispanic Chamber's expert, testified that 33% to 43% of Anglos crossed over to vote for minority candidates based on an examination of three *statewide* elections. (TT 4/16/92 at 98). However, "courts must not *rely* on data aggregated from all challenged districts in concluding that racially polarized voting exists in each district." *Thornburg v. Gingles*, 478 U.S. 30, 59 n. 28 (1986). Still, on the basis of that testimony, the minority population in the court's district 6 could elect the representative of their choice.

[8] In their Jurisdictional Statements, both the Senate and the Hispanic Chamber claim that they presented evidence that relevant minority groups voted cohesively and thus could be considered together. (Senate's Jur. State., p. 4. n. 6; Hispanic Chamber's Jur. State., p. 11 n. 3). However, their Jurisdictional Statements do not cite to any evidence to support this position, and the evidence at trial did not support it.

Accordingly, the primary disagreement at trial was the proper configuration of District 6: whether it should encompass geographically compact minority groups, or affirmatively seek to maximize an *aggregated* minority population through a checkerboard, block-by-block redistricting, which itself splintered communities, particularly the Hispanic community in Maricopa County.

Third, the appellant Senate argues that in adopting its plan "the court below gave no reasons grounded in the policy of the Voting Rights Act for rejecting the three plans before it that would have created a second congressional district in which minorities would constitute a majority or close to a majority of the population." (Senate's Jur. State., p. 6).

To the contrary, the court not only gave its reasons for rejecting each of the other plans, but it specifically rejected the Senate's and the Hispanic Chamber's argument that there ought to be a second majority-minority district based on a purported right to proportional representation under the Voting Rights Act, noting that it would fragment and splinter communities of interest "resulting in an unreasonable gerrymander." (Opinion at 11A).

## REASONS FOR SUMMARY AFFIRMANCE

The thrust of the appellants' attack on the district court's congressional redistricting plan is that the court was obligated to gerrymander Arizona's sixth congressional district so as to create a second district in which minorities would purportedly have an opportunity to elect the representative of their choice.

Yet, appellants never proved that a second such district could be created: Even through "an unreasonable gerrymander" (as the court characterized it), appellants could only create a district with a combined minority voting age of at best 43.6% and did not prove that the different minority groups were politically

cohesive such that they could be aggregated.[9] Nor did they show that racial bloc voting usually defeated the minorities' preferred candidate. (Opinion at 8A).

Nonetheless, appellants contend that the court's decision not to create a second "minority" district, assuming *arguendo* that such a district could be formed, constitutes retrogression under Section 5 of the Voting Rights Act. They argue that the district court failed to create minority districts in proportion to minorities' overall percentage of the population and that the percentage of minority districts declined from one of five districts to one of six after Arizona was apportioned an additional seat, thereby constituting retrogression.

Neither of these points constitutes a substantial question. No obligation exists to create minority districts in proportion to minorities' percentage of a jurisdiction's population. Indeed, Section 2 of the Voting Rights Act disavows any such obligation: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). In any event, the court's plan granted Hispanics proportional representation: Hispanics represent 15.5% of Arizona's voting age population, and one Hispanic district out of six districts amounts to 16.67% of the districts.

Appellants' other contention — that the percentage of minority districts declined from one of five to one of six districts — was the direct result of the *federal* reapportionment, and the Voting Rights Act is only intended to prohibit discriminatory voting changes by the *states*. Retrogression results only when a *state's* redistricting makes a protected minority population worse off. Here, the state's redistricting did not reduce the absolute

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[9] Throughout this motion, the *voting age* population, rather than the total population, of protected minority groups will be cited because the overwhelming weight of authority holds that the eligible voting age population of a particular minority, not its total population, is the proper basis for determining whether the minority group is sufficiently large to have the potential to elect the candidate of its choice. *See, e.g., Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989).

number of congressional seats in which minorities have the opportunity to elect the representative of their choice, and Hispanics' share of those seats remained proportionate to their percentage of the voting age population.

In any event, save for their argument on proportionality, appellants fail to contend that the court's redistricting plan violates the Voting Rights Act, or any other law for that matter. Indeed, the court found — and appellants do not dispute — that the parties failed to show a violation of the Voting Rights Act. (Opinion at 8A to 9A). Although appellants argue that such a finding was unnecessary, that does not change the fact that appellants failed to show that the court's plan violated the law; therefore, the court's judgment should be summarily affirmed.

The other issues which appellants raise are easily disposed of. Appellants contend that the court below failed to make sufficient findings of fact for purposes of a Voting Rights Act case. (Senate's Jur. State., pp. 24-25; Hispanic Chamber's Jur. State., p. 12). However, this was *not* an action alleging a violation of the Voting Rights Act; it was an action to adopt new districts in the face of a legislative deadlock. There can be no obligation to make findings as to every element of a Voting Rights Act violation where a court need only choose the redistricting plan that best complies with the law. Indeed, appellants acknowledge this elsewhere in their Jurisdictional Statements by contending that a violation of the Act need not be shown for purposes of adopting a redistricting plan. (Sen. Jur. State., p. 14; Hispanic Chamber's Jur. State., p. 9).

The other issues presented by the appellants are based on mischaracterizations of the district court's decision, and are therefore not properly raised before this Court. Those issues are: (1) whether the district court purportedly elevated neutral redistricting criteria over the Voting Rights Act (Senate's and Hispanic Chamber's Jur. State., p. i), (2) whether the district court erred in purportedly using incorrect causation standards to determine racially polarized voting (Hispanic Chamber's Jur. State., p. i), and (3) whether the district court erred by ordering

into effect — without preclearance — its redistricting plan "without exigent circumstances." (Hispanic Chamber's Jur. State., p. i). Each of these issues is based on an erroneous reading of the court's opinion.

## I. THE DISTRICT COURT'S REDISTRICTING PLAN DOES NOT CONSTITUTE UNLAWFUL RETROGRESSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT

The first issue raised by the appellant Senate is "[w]hether, by adopting a redistricting plan that provides proportionately fewer districts in which minority voters have a reasonable opportunity to elect candidates of their choice than existed prior to redistricting, the district court violated the retrogression standard of Section 5 of the Voting Rights Act." (Senate's Jur. State., p. i).

The Senate actually argues two propositions: (1) that a plan that does not reflect the minority voter strength of Arizona's population constitutes retrogression, and (2) that a plan that reduces the *percentage* of minority-controlled districts from one out of five to one out of six constitutes retrogression. (*See id.* at 10).

Neither argument is supported by the law, *see Beer v. United States*, 425 U.S. 130, 141 (1976); *City of Richmond v. United States*, 422 U.S. 358, 370-371 (1975), and indeed, appellants failed to make the requisite showing to enable them to raise the issue: Appellants never showed that a second minority district could be formed. Even with "an unreasonable gerrymander," appellants could only form, at best, a district with an *aggregate* minority voting age population of 43.6%, and failed to show that the various minority groups were politically cohesive such that they could be aggregated. Indeed, the evidence was to the contrary. (TT 4/13/92 at 77-81, 83-84, 86-87; 4/14/92 at 82-84).

Nonetheless, based on an aggregated minority population, appellants argue that the "court's plan does not fairly reflect the voting strength of Arizona's minority population," and that this constitutes "illegal retrogression under Section 5 of the Voting

Rights Act as this Court has repeatedly held." (Senate's Jur. State., p. 10; Hispanic Chamber's Jur. State., pp. 9-10).

However, first, Hispanics do have proportionate representation under the court's plan: They comprise 15.7% of Arizona's voting age population, and since one of Arizona's six districts, or 16.67% of the districts, already gives Hispanics the opportunity to elect the candidate of their choice, the plan gives them proportionate representation.

Second, this Court has not held that the failure of a redistricting plan to reflect a minority group's voting strength constitutes illegal retrogression. *See Beer v. United States*, *supra*, 425 U.S. 130, 141.

Section 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c, requires that redistricting by a state or political subdivision "not have the purpose and will not have the effect of denying or abridging the right to vote" on account of race, color, or membership in a language minority group. Retrogression occurs only when the ability of minority groups to participate in the political process is made worse off by the voting practice change. *See* 28 C.F.R. § 51 54(a). The failure of a redistricting plan to reflect the minority's proportion of the jurisdiction's population will not constitute retrogression where the absolute number of districts in which minorities have the opportunity to elect the representative of their choice remains the same. *Beer v. United States*, *supra*, 425 U.S. 130, 141; *City of Lockhart v. United States*, 460 U.S. 125, 135 (1983) ("Although there may have been no improvement in [minority] . . . voting strength, there has been no retrogression either"); *see Ketchum v. Byrne*, 740 F.2d 1398, 1402 n.2 (7th Cir. 1984); *Good v. Austin*, ___ F. Supp. ___, 1992 W.L. 173862 at 4 (E.D. Mich. 1992).

In *Beer v. United States*, *supra*, 425 U.S. 130, this Court held that it was error for the district court to conclude that a redistricting plan containing only a single district with a black *voter* majority had the effect of denying the right to vote within the meaning of Section 5 of the Voting Rights Act because on a proportional basis, black voters should be able to choose 2.42 representatives. There, before redistricting, African Americans

constituted half of the registered voters (and a majority of the population) in one councilmanic district. A redistricting plan established an African-American voter majority in one district and a population majority in another district. Nonetheless, the district court ruled that the plan had the effect of abridging the right to vote on account of race under Section 5 because, based on their share of the city's registered voters, African Americans should be able to choose 2.42 of the city's seven councilman. This Court held that it was error for the district court to conclude that the plan violated the retrogression standard of Section 5 because "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." *Id.* at 141.

In this case, too, the court enhanced the position of minorities by retaining the Hispanic district (district 2), increasing the percentage of Hispanics in that district to the level advocated by appellants,[10] and increasing the percentage of Native Americans in another district from a maximum of 14.2% before the court's plan (Sen. exh. 109) to 21.7% under the court's plan. (*See* Hispanic Chamber's Jur. State., Appendix, p. 25A).

Likewise, in *Ketchum v. Byrne*, *supra*, 740 F.2d at 1402 n.2, the Seventh Circuit, in approving the district court's finding of a Section 2 violation based on retrogression in the number of wards with a black majority population, defined "retrogression" as a *decrease* in the *absolute* number of representatives which a minority group has a fair chance to elect:

> "Retrogression" may be defined as a decrease in the new districting plan or other voting scheme from the previous plan or scheme in the absolute number of representatives which a minority group has a fair chance to elect. [citations omitted] Here, the term

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[10] Indeed, the court increased the Hispanic percentage of the voting age population in district 2 from 39.3% to 44.77%, and appellants took the position that any greater Hispanic percentage in district 2 would constitute prohibited "packing." (*See* Senate's Jur. State., p. 5).

> refers to a reduction in the number of wards with an effective majority of the relevant minority group from the number of such wards which existed immediately before the redistricting plan was instituted. . . . To correct retrogression does not necessarily (or usually) imply the achievement of proportional representation.

*Ketchum v. Byrne*, *id.*, 740 F.2d at 1402 n.2.

The Senate's argument that the court's plan constitutes unlawful retrogression because it does not "fairly reflect the voting strength of Arizona's minority population" (Senate's Jur. State., p. 10) is therefore not only contrary to the case law — which looks at whether the absolute number of minority districts has been decreased — but conflicts with the express disavowal against proportional representation in Section 2 of the Voting Rights Act. Section 2 provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

Indeed, if the retrogression standard prohibited redistricting that does not "fairly reflect the voting strength" of a state's minority population, as argued by the Senate, anything *less* than proportional representation would constitute retrogression, making Section 2's proviso a dead letter. Courts have consistently declined to make proportional representation a requirement under the Voting Rights Act. *See, e.g., Beer v. United States, supra*; *Terrazas v. Slagle*, 789 F. Supp. 828, 833 (W.D. Tex. 1991); *Burton v. Sheheen*, 793 F. Supp. 1329, 1992 WL 106354 at 10 (D.S.C. 1992). Nor, of course, would it be practical to require proportional representation: The number of minority-controlled districts that can be created depends on the concentrations and locations of the minority populations in the jurisdiction in issue.

The Senate contends that *City of Port Arthur v. United States*, 459 U.S. 159 (1982), "requires the district court to assure that a proposed redistricting plan . . . fairly reflects the minority's voting strength" (Senate's Jur. State., p. 11), but *Port Arthur* holds nothing of the kind. In *Port Arthur*, the percentage of the black population had been diluted from 45.2% to 40.56% through the *city's* consolidations with neighboring cities and an annexation.

Since the city expansions had the effect of diluting the "relative political strength of the black community," this Court affirmed a judgment of the district court which sought to dispel the adverse impact of the expansion through a plan providing for a black majority in three of six single-member council districts and requiring a plurality vote, rather than a majority, for two of the city's three at-large districts. The Court concluded that without the elimination of the majority vote requirement for the at-large districts, "[i]t does not necessarily follow that the mixed single-member and at-large system at issue . . . sufficiently dispelled the impact of Port Arthur's expansions on the relative political strength of the black community." *Id.* at 167.

*Port Arthur* has no application here because in that case, the minority population was made worse off by the city's change — the city's expansion — and Section 5 approval, therefore, required that it be neutralized to the extent possible. *Port Arthur* does not, and in light of the proviso in Section 2 of the Act could not, stand for the proposition that all redistricting plans must reflect each minority's percentage of the population.

In contrast, in this case, the minority population has not been made worse off by the court's redistricting plan. Instead, they have retained their minority districts and increased their percentage of the voting age population in several districts.

The Senate and Hispanic Chamber argue that retrogression also exists because minority districts have been reduced from one of five (20%) to one of six (16.67%), thereby reducing the *percentage* of districts from which minorities can elect the candidate of their choice. (Senate's Jur. State., pp. 10, 12; Hispanic Chamber's Jur. State., pp. 9-10).

However, since it is mathematically impossible for Hispanics, or other minorities, to retain 20% of Arizona's six congressional seats, appellants are arguing that Hispanics, or other minorities, are entitled to 33% (2 seats), or double the Hispanics' proportion of Arizona's voting age population.

In *City of Richmond v. United States*, 422 U.S. 358, 371 (1975), this Court rejected appellants' argument that a redistricting plan violates Section 5 where it decreases the *percentage* of minority districts. There, the City of Richmond annexed additional land reducing the percentage of black citizens in the city from 52% to 42%. In a section 5 proceeding, the city put forward a nine-ward proposal in which four wards would have substantial black majorities, four would have substantial white majorities, and the ninth would have a racial division of 59% white and 41% black. This Court reversed the district court's holding that the plan had the effect of abridging the right to vote within the meaning of Section 5, because blacks would constitute a lesser proportion of the population after the annexation and have the opportunity to elect fewer representatives to the city council:

> To hold otherwise would be either to forbid all such annexations or to require, as the price for approval of the annexation, that the black community be assigned the same proportion of council seats as before, hence perhaps permanently overrepresenting them and underrepresenting other elements in the community, including the nonblack citizens in the annexed area. We are unwilling to hold that Congress intended either consequence in enacting § 5.

*City of Richmond v. United States, supra*, 422 U.S. at 371.

Appellant's argument that the reduced *percentage* of minority-controlled districts constitutes retrogression is also flawed because the reduced percentage is the direct result of the *federal* reapportionment wherein Arizona was awarded an additional district. 2 U.S.C. § 2a. The Voting Rights Act only covers voting practice changes by a *State*, and Section 5 was intended to prohibit only *states* from making discriminatory voting changes. Unlike *Port Arthur*, where *state* action led to the dilution of black voting strength, the *percentage* reduction in minority seats from

one of five to one of six is the result of *federal* action, does not dilute voting strength, and cannot be considered retrogression.[11]

Accordingly, appellants' position that the court's congressional redistricting plan constitutes retrogression has no basis. The Voting Rights Act disavows any obligation to provide proportional representation, the Hispanic community nonetheless has proportional representation, the court's plan enhances minority voting strength, and the reduction in the *percentage* of minority districts is due to the federal apportionment of an additional district to Arizona, not any action the state controls.

## II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION CONCERNING THE LAWFULNESS OF THE COURT-ADOPTED PLAN

The next issue presented by the Senate and Hispanic Chamber is whether "the district court misapplied this Court's decision in *Thornburg v. Gingles* by requiring the parties to prove a violation of Section 2 of the Voting Rights Act as a prerequisite to the creation of additional districts in which minorities have an equal opportunity to elect candidates of their choice." (Senate's Jur. State., p. 13; *see also* Hispanic Chamber's Jur. State., pp. 6-9).

There are two answers to this: First, the district court never stated that a Voting Rights Act violation was a prerequisite to the creation of minority districts, only that the parties had failed to demonstrate a violation under the Voting Rights Act because there was no proof that "a white majority voted sufficiently as a

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[11] *McMillan v. Escambia County, Florida*, 559 F. Supp. 720 (N.D. Fla. 1983), *cert. denied*, 464 U.S. 830 (1983), also cited by the Senate, is distinguishable on the same grounds as *Port Arthur*. The district court was again considering the lawfulness of a *state* action to expand the seats on a county commission from five to seven, which would dilute the right of African Americans to elect commissioners from 20% to 14% of the commissioners, where blacks constituted approximately 20% of the county's population. Again, the *state* plan to expand the seats had the effect of reducing minority voting strength, whereas here, it is the *federal* apportionment of an additional seat that is responsible for any reduction in the minority population's percentage share of the congressional districts.

bloc to usually defeat a minority's preferred candidate" — the third prong of the *Gingles* test. (Opinion at 8A). Second, appellants nowhere contend that the court-adopted plan violates Section 2 of the Voting Rights Act if *Thornburg* is properly applied. Therefore, the court's plan is lawful, and in light of the court's discretion to select a redistricting plan in the face of a legislative impasse, its judgment must be affirmed.

**A. The District Court Did Not Misapply The Voting Rights Act.**

Appellants argue that the district court held "that the parties must demonstrate a threshold violation of Section 2 of the Voting Rights Act in order for a three-judge district court to consider the effects of redistricting on minority voting strength," and that this "entirely misconstrues the Act's proper role in the redistricting process." (Senate's Jur. State., pp. 9, 13-15; *see also* Hispanic Chamber's Jur. State., pp. 6-9).

The appellants' argument is based on a single sentence in the district court's opinion, which states: "Accordingly, the court also finds that the parties, and particularly the Senate, failed to demonstrate that there has been a denial or an abridgement of the right to vote on account of race or color, requiring remedial action under the Voting Rights Act." (Appendix, pp. 8A-9A).

Read in context, the only point of the sentence is that no showing had been made that required a plan that affirmatively created a minority district that would otherwise not be required but for the need to remedy a prior violation. *See Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991) (To require that the minority constitute a majority in a district before creating it "would prevent any redress for districting which was deliberately designed to prevent minorities from electing representatives. . . .") The sentence in no way states that a violation of the Act is a prerequisite to consider the effects of redistricting on minority voting strength.

Indeed, contrary to appellants' contention, the court expressly considered the effects of redistricting on minority voting strength in its selection of a redistricting plan. First, the

district court determined that its plan "comports with the requirements of the Voting Rights Act by giving Arizona's Hispanic population an opportunity to elect a candidate of their choice in District 2" and concluded that the percentage level of Hispanics advocated by appellants was sufficient for District 2. (Opinion at 9A).

Second, it determined that the failure to make an additional majority-minority district did not constitute a violation of the Voting Rights Act and that such a district (which would not have been a majority-minority district in any event) would have fragmented and splintered communities of interest:

> The Senate also argues that the failure to make the new district six a second majority-minority district would constitute a violation of the Voting Rights Act. The Senate's argument is founded on the principle that there is a right to proportional representation. No such right exists. [citations omitted] Under any of the proposed plans, district six encompasses hundreds of square miles of sparsely populated areas in the eastern and northern parts of the state. Applying the totality of the circumstances test under the Voting Rights Act, the court finds that adopting the Senate's reasoning would result in block-by-block redistricting over a large geographical portion of Maricopa County. The effect would be the fragmentation and splintering of communities of interest, resulting in an unreasonable gerrymander. *See Gingles*, 478 U.S. at 49.

Opinion at 10A-11A.

Thus, the court properly applied the Voting Rights Act, considered the effect of redistricting on minority voting rights, and concluded that the appellants had not shown that their gerrymandered, block-redistricted sixth congressional district was necessary in order to satisfy the Voting Rights Act.

**B. Even Assuming, Arguendo, That The District Court Erroneously Required Proof of A Violation Of The Voting Rights Act, It Was Harmless Error Because Appellants Fail To Show That The Court-Adopted Plan Violates The Law.**

Even assuming, *arguendo*, that the district court misapplied the Voting Rights Act by purportedly requiring the parties to prove a violation of Section 2 of the Act, the finding was harmless. None of the appellants contends — or makes any showing — that the court-adopted plan (or the Indian Compromise Plan on which it was based) violates Section 2 of the Act; therefore, the court's redistricting plan must be upheld.

In the case of a legislative impasse, the district court has discretion in the adoption of a redistricting plan as long as it complies with federal and state law. *See, e.g., O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202-03 (D. Kan. 1982).

Appellants make no contention in their Jurisdictional Statements (and made no showing in the court below) that the court-adopted plan, or the Indian Compromise Plan on which it was based, violated any constitutional, statutory, or neutral redistricting criteria (save for their argument that it does not provide for proportional representation).

Accordingly, regardless of whether the district court misapplied the Voting Rights Act (and it did not), the judgment can be affirmed since the redistricting plan was lawful. This Court "may permit the appellee to defend a judgment on any ground that the law and record permit and that would not expand the relief granted." Rule 18.6, Rules of the Supreme Court of the United States; *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) ("When we summarily affirm, without opinion, the judgment of a three-judge district court, we affirm the judgment but not necessarily the reasoning by which it was reached"); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) (The judgment of a district court may be sustained "on any ground that finds support in the record.")

### C. Voinovich v. Quilter Is Irrelevant To The Instant Case.

The appellant Senate observes that this Court recently noted probable jurisdiction in *Voinovich v. Quilter*, 794 F. Supp. 695 (N.D. Ohio), *vacated in part on other grounds*, 794 F. Supp. 760 (N.D. Ohio), *prob. jur. noted*, 112 S. Ct 2299 (1992). Appellant argues that this Court may wish to consider this case in conjunction with *Quilter* because *Quilter* presents "a similar question" in that "a divided three-judge district court held that a state legislature could not create minority legislative districts absent proof of a violation of the Voting Rights Act." (Senate's Jur. State., p. 14).

However, as noted earlier, the court below did not hold that minority districts need not be created absent proof of a Voting Rights Act violation; indeed, it enhanced Hispanic voting strength in district 2.

In any event, *Quilter* is a very different case from this one. In *Quilter*, the district court enjoined a 1991 redistricting plan *prepared by an Apportionment Board* because the board had failed to justify the creation of minority-controlled districts in the plan. Whereas the issue in *Quilter* is whether the federal court may substitute its judgment for the redistricting body's judgment, in this case the federal court *is* the body responsible for adopting a redistricting plan owing to the legislative deadlock. Whereas the issue in *Quilter* is whether a state redistricting body is *permitted* to create minority districts where it has not established that a violation of Section 2 of the Voting Rights Act purportedly requires their creation, *see Voinovich v. Quilter*, no. 91-1618, Jur. State., p.i, 10, the issue here is whether a federal court's redistricting plan is *required* to create an aggregate minority district.

Since appellants do not claim that the court's plan fails to comply with the Voting Rights Act, save for their argument that proportionality is required, the judgment here should be summarily affirmed.

## III. THERE IS NO SUBSTANTIAL FEDERAL QUESTION CONCERNING THE ADEQUACY OF THE DISTRICT COURT'S FINDINGS

The appellant Senate argues that the district court's opinion does not comply with the requirements of Rule 52(a), Federal Rules of Civil Procedure, because it fails to discuss "significant evidence contrary to its opinion or to explain the factual bases of its decision." (Senate's Jur. State., p. 24) The Senate bases this argument on the grounds that the requirements of Rule 52(a) must be "strictly enforced in Voting Rights Act cases." *Id.*

However, this is not a Voting Rights Act case wherein a plaintiff alleges that an enacted redistricting plan violates the Act. Instead, in this case, the district court was required to adopt a redistricting plan following the 1990 reapportionment because of a legislative stalemate. (Complaint, ¶¶ 23, 24). In such an instance, the district court need only choose a plan that appears to best comply with the constitutional and statutory redistricting criteria. *See, e.g., Good v. Austin*, ___ F. Supp. ___, 1992 WL 173862 at 2 (E.D. Mich. 1992); *Hastert v. State Board of Elections*, 777 F. Supp. 634, 640 (N.D. Ill. 1991); *Wilson v. Eu*, 1 Cal. Rptr. 4th 707, 743 (1992).

Accordingly, the court here made sufficient findings when it analyzed each proposed plan, explained each plan's shortcomings, and described why its plan was the best. The cases cited by the Senate for the contention that further findings are necessary are inapposite. Those cases involved alleged violations of the Voting Rights Act, *e.g., Velasquez v. City of Abilene, Texas*, 725 F.2d 1017 (5th Cir. 1984), and therefore necessarily involved findings as to each element of a Voting Rights Act violation.

Indeed, appellants defeat their argument by acknowledging that a court need not find a violation of the Voting Rights Act in order to adopt a redistricting plan in the face of a legislative stalemate. (*See* Senate's Jur. State., pp. 13-15; Hispanic Chamber's Jur. State., p. 9).

In any event, since a redistricting plan need only comply with the Voting Rights Act, and that merely requires that the plan *avoid* satisfying just one of the elements of a Voting Rights Act violation, *see Wilson v. Eu*, 1 Cal. Rptr. 4th 707, 745 (1992), detailed findings as to each element under the Voting Rights Act

are not required. *See Burton v. Sheheen*, 793 F. Supp. 1329, 1992 WL 106354 at 13 (D.S.C. 1992) (in adopting a redistricting plan in a non-section 2 challenge, the court should consider the standards of Section 2 but it is not obligated "to completely graft the tests and requirements of Section 2, including its searching evidentiary requirements" in the proceeding).[12]

## IV. THE OTHER ISSUES PRESENTED BY APPELLANTS ARE NOT PROPERLY BEFORE THIS COURT

### A. There Is No Issue Whether Neutral Redistricting Criteria Were Elevated Over Consideration Of Minority Voting Rights

The appellant Senate presents as an issue whether "the district court improperly elevate[d] the so-called 'neutral criteria' of protecting incumbents, maximizing compactness of districts, and preserving communities of interest above the adoption of a plan that fairly reflects . . . minority voting strength . . . where the State's public policy is to protect voting strength . . . ." (Senate's Jur. State., p. i).

The Hispanic Chamber likewise asks whether the court below erred "in elevating nonconstitutional good government factors to primary considerations over minority voting rights . . . ." (Hispanic Chamber's Jur. State., p. i).

To the contrary, the district court did not elevate neutral redistricting criteria over minority voting rights. It expressly recognized that the requirements of the Constitution and the Voting Rights Act had to be met before the court could look at neutral redistricting criteria:

> *Once the constitutional and Voting Rights Act standards are met*, a court may look to several neutral criteria. These criteria are (1) preserving communities of

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[12] Appellants argue that, assuming more detailed findings are required, the district court inadequately explained how such factors as finances, the quality of the candidate, and campaign strategy "rendered the parties' proof of racial bloc voting unpersuasive." (Senate's Jur. State., p. 25). As shown in section IV(B), the court's opinion does not say that.

> interest, (2) providing geographically compact and contiguous districts; and (3) avoiding unnecessary or invidious outdistricting of incumbents.

(Opinion at 6A). [Emphasis added].

Further, only after the court determined that its plan "comports with the requirements of the Voting Rights Act by giving Arizona's Hispanic population an opportunity to elect a candidate of their choice in district two" (Opinion at 9A) and only after it rejected the appellants' efforts to create a gerrymandered 43.6% minority voting age district in district 6 (Opinion at 10A-11A) did the court turn its attention to the neutral redistricting criteria for drawing congressional districts and determined that its plan best complied with those criteria as well: "The court next turns its attention to the neutral criteria for drawing congressional districts." (Opinion at 11A).

The appellant Senate argues that "[t]he district court plainly erred in substituting its priorities for the clear public policy of Arizona" which it claims is "to enhance minority voting strength. . . ." It claims that "[a] clear expression of this State policy can be seen in the legislative parties' plans presented to the court below." (Senate's Jur. State., p. 19).

Appellant is incorrect to contend that the district court erred in substituting its priorities for the public policy as expressed in the legislative parties' plans. Where there is a legislative impasse, courts are not obligated to accord special deference to a legislative proposal that has not been enacted. *See, e.g., Major v. Treen*, 574 F. Supp. 325, 335-336, n.15 (E.D. La. 1983), *aff'd sub nom., Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982) ("Both the Governor and the legislature are integral components of the legislative process; thus any plan that does not survive this process to become law . . . cannot be deemed a clear articulation of established state goals"); *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 932 (W.D. Mo. 1982); *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982).

In contrast, *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982), cited by the Senate, involved a *duly enacted* plan. In contrast with

proposed plans, courts are to treat with deference those portions of *duly enacted* redistricting legislation to which no legal challenge is made. *See, e.g., White v. Weiser*, 412 U.S. 783, 796 (1973) (with respect to a duly enacted Texas redistricting plan that had been found to contain impermissible population variances, the district court erred by failing to choose the plan that both cured the constitutional defects and "most clearly approximated the reapportionment plan of the State Legislature"); *Upham v. Seamon*, *supra*, 456 U.S. 37, 40-41 (1982) (this Court held that the district court exceeded its discretion when, in ordering relief, it revised duly enacted districts to which no Voting Rights Act objection had been made). In this case, given the legislative deadlock, the district court was not obligated to adopt the Senate's plan as the purported expression of State public policy, and in any event, the Senate's block-by-block redistricting, resulting in "an unreasonable gerrymander," has never been Arizona State policy.

Appellant Senate contends that the district court elevated neutral criteria at the expense of minority voting concerns in allegedly fragmenting "three 72-83% Hispanic precincts . . . away from Hispanic majority District 2 and into District 3 . . . to avoid outdistricting an incumbent . . ." (Senate's Jur. State., p. 20 n.17). This apparently refers to the court's decision to include El Mirage and Surprise in district 3 rather than district 2. However, the evidence showed that these precincts were geographically separate and distant from the remainder of the Hispanic population in district 2 (TT 4/13/92 at 123, 127), and linking them to district 2 would add only approximately 1% to the Hispanic population in district 2 (Opinion, p. 14A), an additional amount that appellants argued was unnecessary to allow the Hispanic population in district 2 to elect the candidate of their choice.[13]

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[13] The Senate also argues that the protection of incumbents "should never be used at the expense of minority voting strength," implying that somehow the court was guilty of doing so. (Senate's Jur. State., p. 21). However, the court did not seek to protect incumbents but simply sought to avoid "unnecessary or invidious outdistricting of incumbents." (Opinion at 7A)

**B. There is No Issue As To Whether The Court Erred In Its Findings Concerning Racial Bloc Voting.**

Both appellants argue that the district court "adopted the erroneous position that racially polarized voting can be explained away by factors such as party affiliation — a question on which this Court was divided in *Gingles*" and that "it is important that this Court resolve this issue in order to give adequate guidance to the district court." (Senate's Jur. State., p. 22; *see also* Hispanic Chamber's Jur. State., pp. i, 10-13).

However, the court did not do this, and no such issue is properly raised on appeal. First, the court below did not rule that "racially polarized voting" can be explained away by party affiliation. Rather, the court correctly ruled that none of the parties had proven "that a white majority voted sufficiently as a bloc so that it usually defeated a minority's preferred candidate" and that *instead* voting behavior was closely associated with party affiliation:

> It was clear from all the evidence that there are some differences between the voting patterns of Hispanics and non-Hispanics. However, none of the parties proved that a white majority voted sufficiently as a bloc so that it usually defeated a minority's preferred candidate. *See Gingles*, 478 U.S. at 48-49 (holding bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group). Instead, the evidence showed that Arizonans' voting behavior is also closely associated with party affiliation. Accordingly, the court finds that the parties have not satisfied the third prong of the *Gingles* test.

(Opinion at 8A).

Accordingly, the court never stated that party affiliation explains away racial bloc voting, only that there was no evidence that the white majority votes as a bloc to defeat a minority's preferred candidate. Indeed, racial bloc voting was not the issue, but instead whether it rose to the point where the white majority

votes as a bloc to defeat the minority's preferred candidate. *See Thornburg v Gingles*, 478 U.S. 30, 52-56 (1986).

Second, even if the district court had determined that racial bloc voting was explained away by party affiliation, it would be irrelevant because appellants made no showing that they satisfied the other elements of a Voting Rights Act violation under *Gingles* such that the failure to create their aggregate minority district would violate the Voting Rights Act. For instance, they failed to show the existence of a geographically compact minority group sufficiently large to elect the representative of its choice in district 6, or political cohesiveness among the minority groups.

Third, the issue is not properly raised here because appellants do not point to any portion of the record that shows that they proved that the white majority voted so much as a bloc *that it usually defeated* a minority's preferred candidate, particularly in connection with district 6. To the contrary, the evidence presented by the appellant Senate showed that Hispanic legislators were winning in districts with substantially less than a 30% Hispanic population.[14]

### C. There Is No Issue As To Whether The District Court Ordered Its Plan Into Effect Without A Finding Of Exigent Circumstances

The Hispanic Chamber argues that the "district court erred by ordering into effect its own permanent plan for elections without exigent circumstances and thereby completely circumventing Section 5 preclearance requirements for an entire decade." (Hispanic Chamber's Jur. State., p. 14; *see also* Hispanic Chamber's questions presented).

The appellants misunderstand the basis on which preclearance was excused; therefore, the issue is not properly raised. Preclearance was not excused on the basis of exigent circumstances (although they could have — the court's decision

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[14] The President of the Arizona State Senate, Peter Rios, a Hispanic, testified that he won in a district that was less than 30% Hispanic in population. (TT 4/15/92, evening session at 12). *See also* note 7, *infra*.

came only 21 days before the date for filing candidate nominating petitions),[15] but instead on the basis that the court-adopted plan did not need to be precleared under *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981), because it does not "reflect[] the policy choices of the elected representatives of the people." (Opinion at 18A). In *McDaniel v. Sanchez*, *id.*, this Court ruled that although the Voting Rights Act preclearance requirement under Section 5 does not apply to plans prepared and adopted by a federal court to remedy a constitutional violation, *id.* at 138, it does apply when the court adopts a proposal "reflecting the policy choices of the elected representatives of the people." *Id.* at 153.

In this case, the district court expressly found that its plan, which was based on the Indian Compromise Plan and then further modified by the court, did not reflect the policy choices of the elected representatives of the people but "solely reflects the decision of the court." (Opinion at 18A). The district court accordingly concluded that the plan was not subject to preclearance and ordered the plan into effect unless the Arizona Legislature enacts its own plan which meets the requirements of federal law. (Opinion at 18A, 20A).

Significantly, the Hispanic Chamber's jurisdictional statement does not contest this finding. Appellants instead argue that exigent circumstances did not exist to excuse preclearance. (Hispanic Chamber's Jur. State., p. 14-15). Since exigent circumstances were not the basis for excusing preclearance, appellants' issue is not appropriate for review.[16]

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[15] *See* A.R.S. §§ 16-311, 16-314; Opinion at 20A.

[16] Moreover, the Hispanic Chamber waived its right to claim error by not responding to the court when it raised the issue of preclearance as to the Indian Compromise Plan. (TT 4/17/92 at 56).

## V. CONCLUSION

For all these reasons, appellees submit that none of the issues raised by appellants merit plenary review by this Court. Appellants fail to show that the district court had an affirmative obligation to gerrymander Arizona's new district in an attempt to create a 43.5% combined minority voting-age-population district through block-by-block redistricting (where the right to aggregate minority groups was not shown), or that the district court's plan violated the law. The judgment below should be summarily affirmed.

DATED: September 30, 1992

Respectfully submitted,

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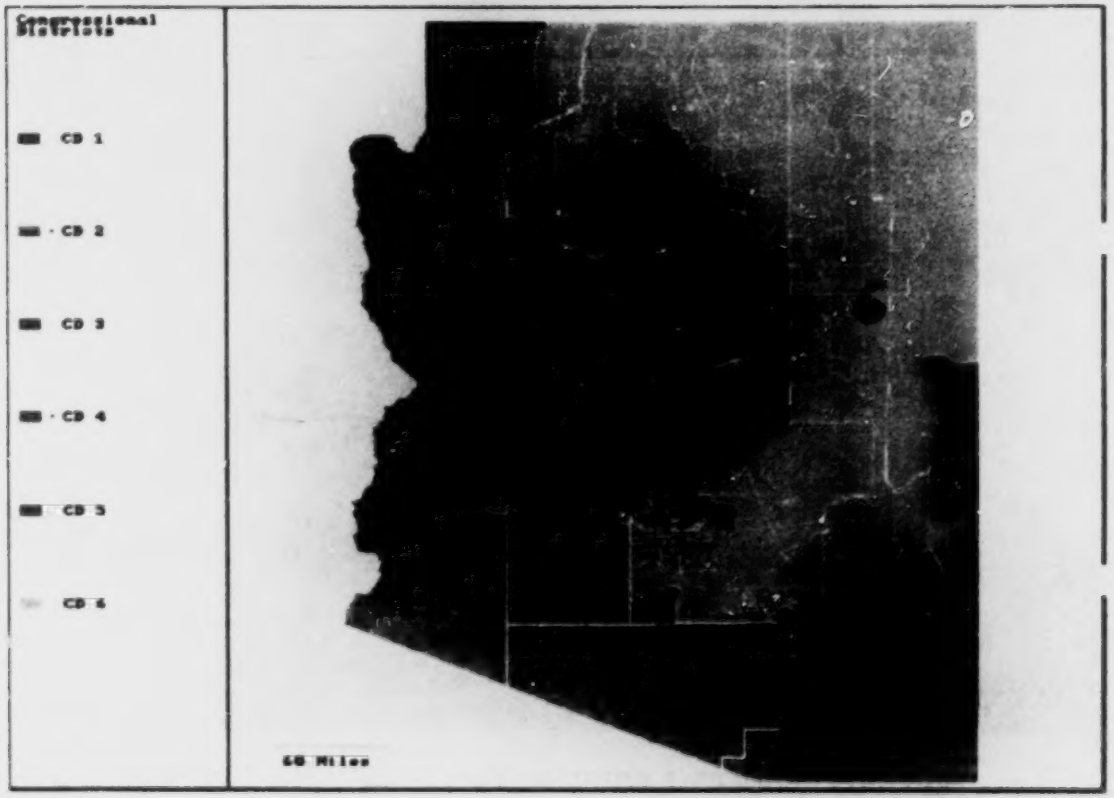
# APPENDIX A

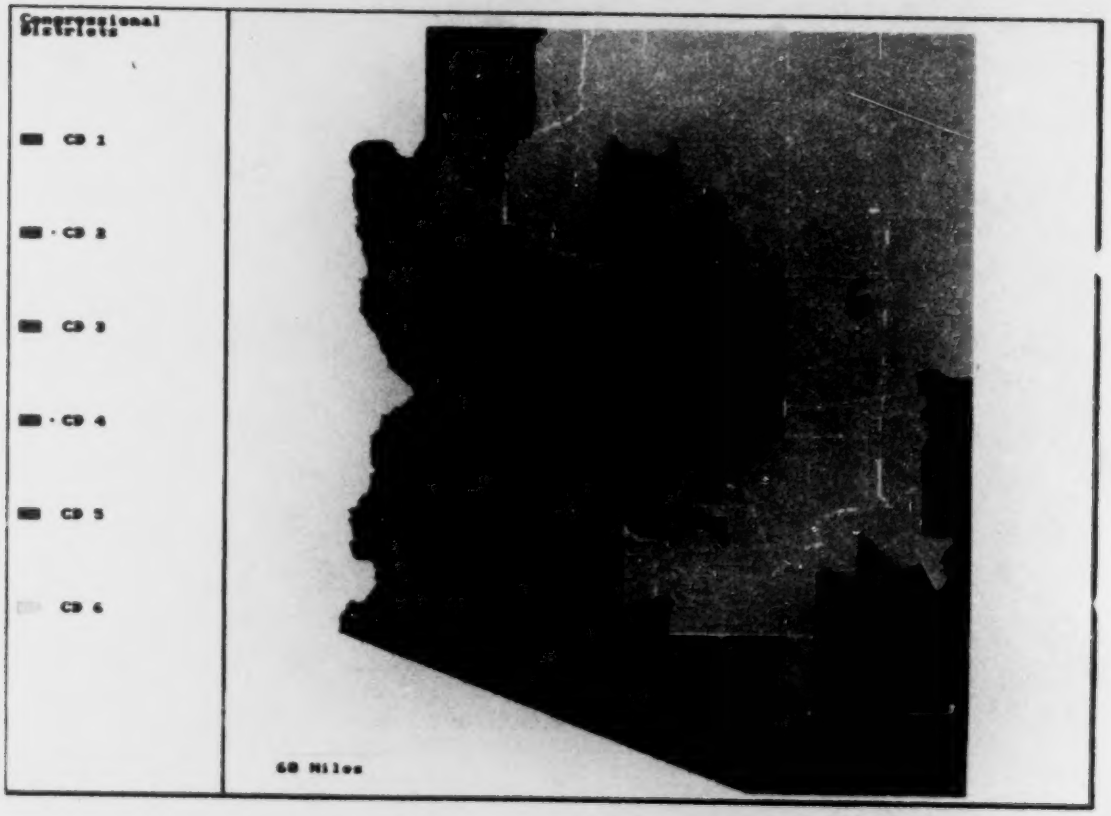
## Senate's Proposed Congressional Districts - Arizona



## Senate's Proposed Congressional Districts - Phoenix

# APPENDIX B

Hispanic Chamber/Hispanic Forum



Hispanic Chamber/Hispanic Forum

Maricopa County portion of Hispanic Chamber's District 6